FILE COPY.

Office Supreme Court, U. S.
FILED.
MAR 31 1908
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

Original, No. 2

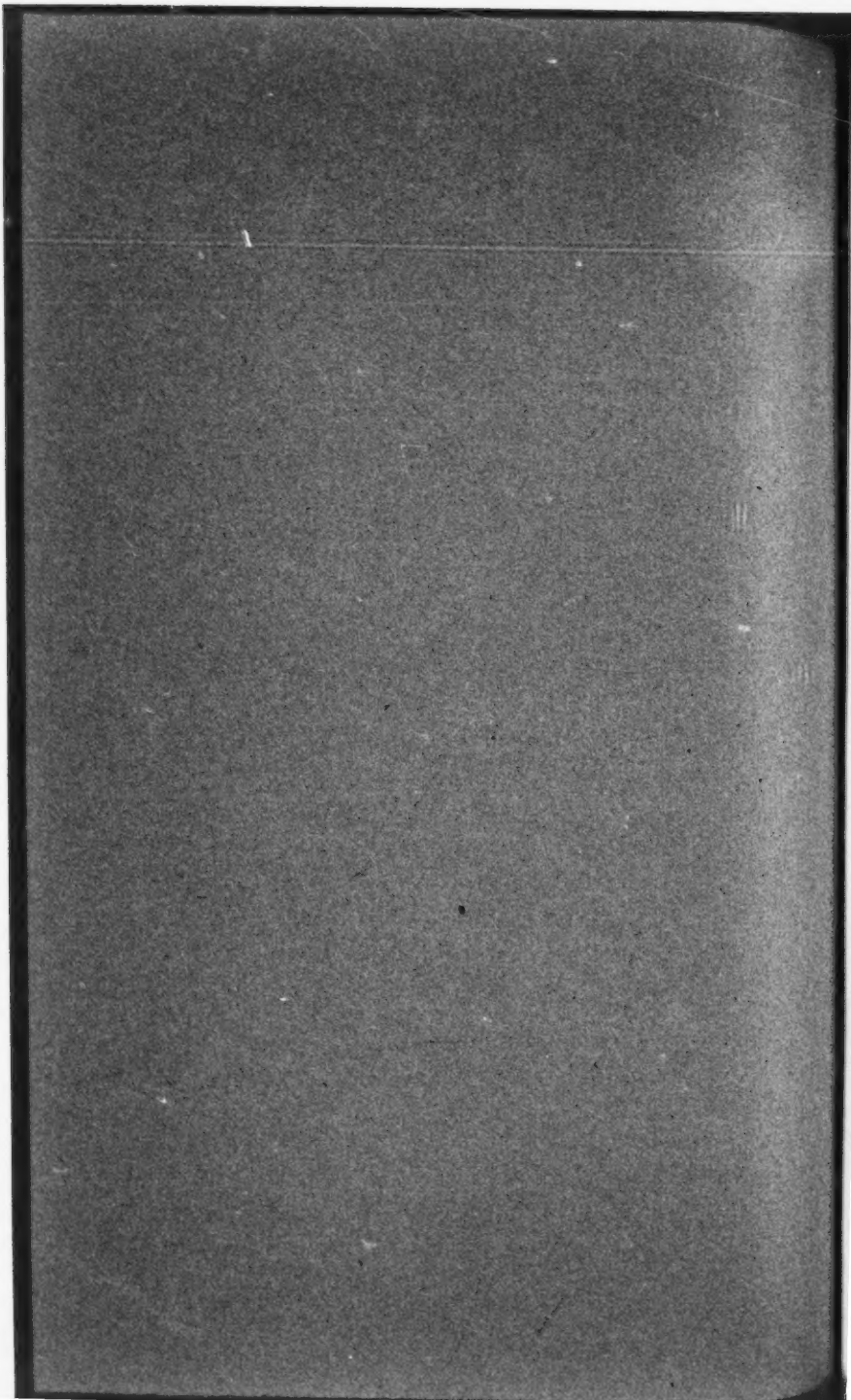
COMMONWEALTH OF VIRGINIA, COMPLAINANT,

v.

STATE OF WEST VIRGINIA, DEFENDANT.

BRIEF IN REPLY TO DEFENDANT.

HOLMES CONRAD,
Of Counsel.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

Original, No. 4.

COMMONWEALTH OF VIRGINIA, COMPLAINANT,

v.

STATE OF WEST VIRGINIA, DEFENDANT.

BRIEF IN REPLY TO DEFENDANT.

On behalf of the complainant, an order is asked for referring this cause to a master to ascertain and report—

> "what amount and proportion of said indebtedness and of the interest accrued thereon should in equity be apportioned to, and be now paid by, the State of West Virginia."

The order further provides that the master shall—

> "make and return with his report any special or alternative statements of the accounts between the complainant and the defendant in the premises which either may desire him to state, or which he may deem desirable to present to the court."

The object of this latter provision is to have stated and presented to the court the several methods or plans which, in the view of the respective parties, properly expresses and illustrates the correct method of ascertaining the "just pro-

portion" of the public debt of the Commonwealth of Virginia which each party should bear.

The court, having before it the accounts, stated in accordance with the views of each side, may be better enabled to judge of their respective merits and elect between them, and so avoid the delay which would be occasioned by a recommitment of the report.

On behalf of the State of West Virginia it is proposed, in section 2 of the draft of the decree presented by counsel, that the master shall state in his report—

(*a*) The amount of State expenditures made by the Commonwealth of Virginia prior to the first day of January, 1861, within the territory now included within the State of West Virginia since any part of said indebtedness was contracted, as provided by the ordinance adopted by the Commonwealth of Virginia, at Wheeling, August 20, 1861.

(*b*) The aggregate ordinary expenses of the State government of the Commonwealth of Virginia prior to January 1, 1861, and since any part of the said indebtedness was contracted.

(*c*) All moneys paid into the treasury of the Commonwealth of Virginia from the counties included within the State of West Virginia during said period.

Among the "ordinances and acts of the restored government of Virginia, prior to the formation of the State of West Virginia," passed in the convention which assembled at Wheeling on the 11th of June, 1861, there was one ordinance, passed August 20, 1861, entitled "An ordinance to provide for the formation of a new State out of a portion of the territory of this State," the ninth section of which ordinance was as follows, viz:

> "The new State shall take upon itself a just proportion of the public debt of the Commonwealth of

> Virginia prior to the first day of January, 1861, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during the same period," etc.

It will be seen at once that the provision of the proposed decree is a wide departure from the Wheeling ordinance, in that it does not even propose to ascertain by the method indicated West Virginia's "just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861." It was doubtless too apparent to the framers of the decree that the method proposed by the Wheeling ordinance had in fact, as we will show, no sort of connection with such public debt, and the account, stated as there suggested, might well have been taken, had no public debt of Virginia ever existed.

From the plan proposed by the Wheeling ordinance, as from that proposed in the decree offered by the defendant, there is altogether excluded any account of or reference to the public debt of the Commonwealth of Virginia, evidenced by bonds and other evidences of indebtedness outstanding on the first of January, 1861. The only settlement which this method could effect would be a mere accounting between two sections of Virginia, *inter sese*, of the amounts which had been paid into the treasury of Virginia from each section and the amounts which had by the appropriations of their common legislature been expended in each section during the period between 1822 and 1861.

If it should appear from such an accounting that the counties lying west of the mountains, and now constituting West Virginia, had during such period paid into the treasury of Virginia more money than had been expended by the State legislature within said counties, what possible connection could the result reached by that account have upon the

outstanding public debt of Virginia? Is there any provision or principle of law under which one county, or any number of counties, in a State can claim that the amounts paid to the State in the way of legal taxes shall not exceed the amounts which such counties receive from the State in the way of legislative appropriations? Can such counties claim that they should not be required to contribute their share of the public taxes toward the payment of the State indebtedness because, forsooth, they have through a period of sixty years paid into the State treasury more money than they have received from it? Coming to the case in hand, we have the request made to this court, in the decree offered by defendant, that the master, who may be directed to ascertain and report to the court what proportion and amount of the public debt of Virginia should justly and equitably be now borne by West Virginia, shall ascertain such amount and proportion by taking the aggregate amount of the taxes and ordinary State expenses collected from the counties constituting West Virginia and the amounts paid into said counties by legislative appropriation since 1822 and, deducting the smaller amount from the greater, report the balance so found to the court as West Virginia's just proportion of the public debt as of January, 1861.

The court has overruled the demurrer to the bill, and in doing so has stated in effect that the case stated in the bill entitles the complainant to the relief prayed, if such case is established by the proof. Is the case stated in the bill satisfied by the Wheeling ordinance?

The defendant was fully warranted in reiterating again and again in her answer that Virginia has always repudiated the Wheeling ordinance as binding on her, or as affording to any extent a satisfaction of Virginia's reasonable demand that West Virginia should contribute her just and reasonable share of that common indebtedness.

The Wheeling ordinance is impracticable, illusory, and altogether inadequate.

In suggesting here considerations which warrant us in insisting that the Commonwealth of Virginia cannot lawfully be bound by the ordinances of the Wheeling convention, which provided for the repudiation by the people of West Virginia of their liability to contribute toward the payment of the public debt of Virginia, we must not be understood as criticising in any manner the constitutional status of the State of West Virginia. It is as firmly entrenched and established as any State in the Union. What we do deny and repudiate is the claim asserted, that in matters relating to the pecuniary obligations—legal or equitable—of that State, the acts or ordinances of that convention which assembled in Wheeling in June, 1861, calling itself a convention of Virginia, and which professed to preserve, protect, and defend the interests of Virginia while actually engaged from its outset in providing for the dismemberment of Virginia—that such acts and ordinances, so far as they were designed to relieve West Virginia from her proper share of the public debt of Virginia, are of any legal, equitable, or moral binding effect on Virginia.

We object to West Virginia's proposed plan of settling the accounts, because—

(1) The Plan of the Wheeling Ordinance and of Defendant's Decree Is Impracticable.

It is charged in the bill and admitted in the answer of defendant that the public debt of Virginia, as of January, 1861, was about $33,000,000, and was evidenced by the bonds and other evidences of indebtedness of the Commonwealth of Virginia issued prior to that date. At the periods when said public debt was created the counties now constituting the State of West Virginia were each represented in the legislature of Virginia and in the executive councils of that State; that such representatives in the legislature advocated and voted for the creation of this debt and the appli-

cation of its proceeds to the construction of works of internal improvement, which were designed for the benefit and welfare of the entire Commonwealth; that the region now forming West Virginia was the portion of Virginia toward which the greater part of such public works tended, and it was for the development of that region they were primarily designed. Hence it is that we insist that not only on the principles of international law, but on the homelier and more intelligible rules of common honesty and morality, as well as upon legal and equitable doctrines, West Virginia is as much bound as Virginia for this public debt.

The Wheeling ordinance ignores these solemn evidences of the public indebtedness, and proposes to go back to the year 1824, through a period of nearly sixty years, and inquire into the consideration of all these evidences of a common indebtedness, and into the various objects to which were applied the moneys obtained for them as they were made and issued. It requires the production of the vouchers and evidences of every dollar paid into the public treasury of the money derived from the taxation of the counties now forming West Virginia, and of every dollar appropriated and expended by Virginia within that territory. How far such requirement can be complied with at this time, with fullness and accuracy, it is impossible to tell.

It should be enough to suggest the danger and uncertainty attending such attempt, to remind the court that the State court-house, in the city of Richmond—the repository of many of the most valuable of Virginia's archives—was destroyed by fire at the evacuation of that city, at the close of the Civil War; and further, that many of the most valuable of the State records and files were ravaged during the period of the military government of the State and during the baleful period of "Reconstruction," when hostile aliens had control and possession of the State government and property. To require now that, in order to correctly ascertain the amount which West Virginia should contribute toward the

payment of a public debt, evidenced by bonds to which that State was in effect a party, Virginia should make research through her files and records of nearly sixty years and produce the evidences of the items of receipt and expenditure, so far as the territory of West Virginia is concerned, is a peril and a hardship to which she should not be exposed.

It cannot be claimed that Virginia is in default in the performance of any duty resting upon her to West Virginia. The State officers at the capitol were the common agents of both the litigants here, and both are equally bound by their acts.

It is a fact which should not be forgotten, but to which due weight should be given in any equitable adjustment of the common burden, that it was the voluntary act of the people of West Virginia in withdrawing themselves from the body politic and corporate of Virginia and surrendering all right of participation in her councils and administration of her affairs that has contributed to the present conditions.

But another and more serious objection lies to the Wheeling ordinance as a plan of adjustment. Its evident purpose was to avoid and defeat the very liability to which this bill seeks to hold her. It proceeds on the theory that West Virginia cannot be held for any other amount than the difference between the amounts she—or her constituent counties—paid into the treasury of Virginia and the amount they received from that treasury during the sixty years preceding January, 1861; and also on the theory that those counties should not be held liable for any more of the public debt than was actually enjoyed by them by the extension of the works of internal improvement into or through their territory. It ignores the fact that the liability accrued when the bonds were issued and the money for them was obtained by the State, and not when the works for which that money was borrowed were actually constructed. The construction of the works was arrested by the war. They were not all completed within West Virginia. The war arrested, it did

not prevent, the completed construction; *that* was prevented by the secession of West Virginia.

At the close of the war the spirit of energetic activity which the war had quickened found employment in every field of material development. Never in its history had this country known such an era of successful enterprise and development. The vast resources of wealth in timber, coal, gas, and oil would speedily have secured the capital for the realization of the plans which had been discerned and provided for by the generations of Virginia people sixty years and more before. The works of internal improvement for which this public debt had been created would have been completed, and Virginia's taxable wealth would very soon have been applied to the entire extinction of her public debt; but all this was defeated by the withdrawal of the territory now forming the State of West Virginia; and now that State appears in the unenviable attitude of possessing all the sources of wealth which induced the creation of the public debt—that debt which her people had largely contributed to making—while denying all liability for the bonds by which the debt was evidenced. She is willing to enter upon a settlement as prescribed by the Wheeling ordinance. That ordinance, as we have shown, provides a plan of settlement which omits altogether the public debt.

(2) The Commonwealth of Virginia is Not Bound by the Wheeling Ordinance.

It is true that this court has in one case recognized the restored State of Virginia—the "Pierpont government," as it is called in that case—as the State of Virginia. *Virginia v. West Virginia*, 11 Wallace, 39, was on a bill brought by Virginia "to settle the boundary line between the States of Virginia and West Virginia." The real question presented was the validity and effect of the proceedings by which the counties of Jefferson and Berkeley were transferred in 1866

from the Commonwealth of Virginia to the State of West Virginia. We have endeavored, without success, to obtain a copy of the record of the case, to learn what exactly were the issues presented by the pleadings and the course of the proceedings had in the case in this court. It appears (page 51) to have been argued at December term, 1866, and again, after this court had been differently constituted, at December term, 1870. Justices Davis, Clifford, and Field dissented from the judgment. The case has been rarely referred to in the subsequent decisions of this court. Chief Justice Chase, who sat in the case, did, in *Cæsar C. Jin's case* (Chase Decisions, p. 412), referring to the State government of Virginia, say:

> "Indeed, it is well proven historically that the State and the government thus organized were recognized by the National Government. Senators and Representatives from the State occupied seats in Congress, and when the insurgent force which held possession of the principal part of the territory was overcome, and the government recognized by the United States was transferred to Richmond, it became in fact, as it was before in law, the government of the whole State. As such, it was entitled under the constitution to the same recognition and respect, in national relations, as the government of any other State."

And yet, notwithstanding this solemn judicial declaration as to the validity of Virginia's right to "recognition and respect in her national relations," it appears that on March 2, 1867, Congress, in an "Act to provide for the more efficient government of the rebel States" (14 St. L., p. 428), declared that—

> "Whereas no legal State governments or adequate protection for life or property now exists in the rebel States of VIRGINIA, etc.; * * * and
>
> "Whereas it is necessary that peace and good order should be enforced in said states, until loyal republican State governments can be legally established, &c."

By virtue of this act the entire State government of the restored State of Virginia was swept away—executive, legislative, and judicial—and Major General Godfrey Wetzel succeeded to all their functions.

So it seems that this restored State, on which had been poured the anointing balm of national recognition and acceptance, and which was "entitled under the Constitution to the same recognition and respect in national relations as the government of any other State," was now declared by the political branch of the National Government to have "no legal State government existing in it," and the government that did exist in it was totally abolished.

A natural inquiry is suggested: If the State government, which had been created in Wheeling in August, 1861, and removed to Alexandria in 1863, and transferred to Richmond in 1865, and continued in operation continuously until 1867, was then ascertained and declared to be "illegal," and so extinguished, when had it ceased to be a legal government, or when had it ever become a legal government? Surely, in its "national relations," it could not be both legal and illegal, or legal for some purposes and illegal for others.

Whether a State government exists, and whether it is a lawful and valid government, are political questions, and are to be determined by the political departments of the National Government and not by the judicial. The government of Virginia formed at Wheeling, and continued until after the close of the war, was recognized by the National Government as the true and lawful government of Virginia. In all of its political conduct and relations it must be assumed by the courts to be the true and lawful government of the State. But when it appears, as it does here, that the people of that part of the territory of Virginia which now forms the State of West Virginia were in fact the only people represented in the convention assembled at Wheeling on the 11th of June, 1861, and in the legislatures of Virginia held under the authority of that convention; that the leading object and pur-

pose of those people in assuming the insignia—the title, powers, and authority of the Commonwealth of Virginia—was only to enable them to erect within the territory of Virginia a new State, and to appropriate to its uses all the property of Virginia under their control, and at the same time to absolve themselves from all liability on those bonds which they had united in making, as the evidences of that public debt which they had insisted on creating, then other considerations must apply.

The fiction that the people west of the Allegheny mountains were "the people of Virginia;" that the government which they organized in that region was the government of Virginia; that it became invested with all the powers and authority of the ancient Commonwealth of Virginia, ceases to apply. That fiction has served its purpose; the National Government has recognized this government, for all political purposes, as the Commonwealth of Virginia, and has accepted as valid and efficient the consent given by it to the erection of a new State within the borders of Virginia. Such recognition was the exercise of a power which belonged to the political departments alone. As to the propriety of its exercise the judicial branch is without jurisdiction to inquire. But into the conduct of this government in relation to its civil rights and liabilities—its liability on bonds and contracts, or under the application of equitable doctrines—the judicial courts may inquire, may take jurisdiction, and afford relief. Such courts may inquire into the validity and the *bona fides* of State action. It may ascertain and declare such action to be an impairment of the obligation of contracts. Inquisition may not be made into the motives or the good faith of the law-makers, whether in convention or in legislature, but the actions of these bodies may be annulled or disregarded when they appear to have been procured by fraud, as the judgments of the courts may be without impeachment of the motives of the judge who presided.

In Graham *v.* Folsom, 200 U. S., 253, this court, speaking of an attempt by a county to rid itself of debt, said:

> "But courts cannot permit themselves to be deceived. They will not inquire too closely into the motives of a State, but they will not ignore the effect of its action."

The Wheeling ordinance was ordained by a body of citizens who proclaimed themselves to be citizens of Virginia, assembled in convention to reform and establish her organic law. Their religious duty was to preserve, protect, and ameliorate her material interests; and yet it is manifest that their paramount object was to despoil Virginia of one-third of her territory; to erect upon that portion so cut off a new State, and to endow it with all the money and other property of Virginia found within the limits of the proposed new State. This purpose was actually carried into effect. These things were not conceived and performed to promote the welfare of Virginia. The citizens of Virginia by whom they were done looked not to the welfare of the State whose citizens they were, but to the welfare of that new State, for whose erection they were then providing and the dawn of whose creation was already appearing. The ordinance is entitled "*An ordinance to provide for the formation of a new State out of the territory of this State*," and was passed August 20, 1861. It should be construed, then, in the light of its professed object. Its provisions, so far as they related to the public debt of the Commonwealth of Virginia, and to the ascertainment of the contributive share which the new State of West Virginia should bear, must be construed as designed to secure the interests of West Virginia as opposed to those of Virginia. But one body corporate and politic then existed, but this very ordinance, as its title and body shows, was to partition this existing body and create another body, with opposing and antagonistic interests. The framers of the ordinance were in a little while to become citizens of the new and opposing body. They legislated for their own

future interests and not for the interests of Virginia. Hence it was that in framing this section of the ordinance which prescribed a method of ascertaining the portion of the common burden to fall upon West Virginia they ignored the bonds which evidenced the common debt and provided for an adjustment which involves the items of receipts and expenditures between the two sections of Virginia through a period of nearly sixty years.

The fiction of the restored State of Virginia is again invoked to shield the actual truth. It cannot serve it. It has long ago fulfilled its only mission. It is now too thin and transparent to conceal the truth.

We have already shown, and the attention of the court cannot be too earnestly called to it, that the ordinance, in providing a plan for ascertaining the "just proportion" of the public debt which West Virginia should bear, makes no further reference to that public debt than the words contained in its opening sentence. The plan of ascertainment does not in any way involve the debt. It relates only to the amounts which the two sections of the Commonwealth had paid into the treasury of the Commonwealth and had received from that treasury since 1822. As a plan of ascertaining West Virginia's share of the public debt, it was illusory, disingenuous, and inadequate, and wholly in the interest of the people who framed and passed it.

It cannot be tolerated that one of the parties in interest should be the sole arbiter of the proportion or amount of the common burden which it will bear, or, as contended here, that a plan prescribed by one-third of the people of Virginia should be made the exclusive rule of measurement by which their share of the public debt of the whole people must be ascertained; and this although such one-third had separated themselves, and had met in convention, calling itself the convention of Virginia, which by an ordinance had provided for the erection of a new State within the territory occupied by them, and had by the same ordinance prescribed this rule for the ascertainment of its "just proportion" of said

public debt. It is true, as stated in the answer, that Virginia has always denied that the Wheeling ordinance was binding upon her.

We submit that the debt for which West Virginia is liable is evidenced by the bonds and other evidences of indebtedness of the Commonwealth of Virginia prior to January 1, 1861. We have assumed—and no reason had been shown against it—that, taking into the account the population, area, and values of West Virginia, a reasonable and just proportion of the common burden was two-thirds of the public debt as the proper share to be laid upon Virginia and one-third of it as the proper share of West Virginia.

Apportioning the common burden on this basis, it would yet be competent for West Virginia to show on the taking of the account any just grounds that she may have of abatement of the amount thus ascertained, whether by payments, set-offs, or otherwise. The amount of the public debt is admitted to be about $33,000,000. The exact amount can be readily ascertained. This should form the basis of any accounting between the two States. It is a fixed and certain factor. The liability of West Virginia for a just and reasonable proportion of this debt is not denied. The proportion in which it should be borne by the two States must be determined by some rule which the court may prescribe or which the master may adopt. The result is then readily ascertained.

If the court desire it, the master may be instructed as to the principles, rules, and methods which he must employ in stating and settling the account, or he may be authorized to return with his report such alternative statements of the account as to him may appear proper or as either party to the cause may require.

In the argument of counsel for West Virginia in support of the demurrer to the bill it was pointed out that by section 8 of article 8 of the Constitution of West Virginia it was provided that—

> "An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State; and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years;"

and that by the act of May 13, 1862, of the legislature of Virginia it was provided—

> "That the consent of the legislature of Virginia be, and the same is hereby, given to the formation and erection of the State of West Virginia within the jurisdiction of this State, * * * according to the boundaries, and under the provisions set forth in the Constitution for the said State of West Virginia, and the schedule thereto annexed, proposed by the convention which assembled at Wheeling on the 26th day of November, 1861."

From these two provisions the conclusion was deduced that a compact had been entered into by the two States, by which the legislature of West Virginia was made the sole arbiter of the fact and the amount of West Virginia's liability.

The court in its opinion (206 U. S., 320) disposed of that contention by saying:

> "When Virginia, on August 20, 1861, by ordinance provided for the 'formation of a new State out of the territory of this State,' and declared therein that 'the new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861,' to be ascertained as provided, it is to be supposed that the new State had this in mind when it framed its own constitution, and that when that instrument provided that its legislature should ascertain the same as soon as practicable, it referred to the method of ascertainment prescribed by the Virginia convention,"

the soundness of which reasoning cannot be questioned. The court was dealing with the question before it, which was the demurrer of West Virginia to the bill of Virginia. On the demurrer, all the allegations of the bill were taken for true. It was a fact that such ordinance had been adopted by the convention assembled at Wheeling. It was also a fact that the matters recited were in the acts and proceedings of the legislatures and conventions; but it was even more significantly the fact that the members of the Wheeling convention of August, 1861, and the members of the convention that framed the constitution for West Virginia knew what was in each other's minds, and what had been the acts of each body, for they were the same people, and it was all done in the same convention and at the same time, as appears by the official records (11 Wall., p. 41).

The court, in its opinion on the demurrer, did not decide or intimate any opinion as to the validity, or legal effect, or binding force of the Wheeling ordinance on the people of Virginia. It was manifest from the bill that the Wheeling ordinance was referred to there only as an additional expression by West Virginia people of their liability for the public debt. Virginia had never recognized for a moment that she was bound by an act which had so plainly for its object the casting upon her of the entire burden of the debt. The answer of defendant here complains that Virginia had persistently repudiated all responsibility for and liability under that ordinance.

The True Basis of Virginia's Right to an Accounting.

In paragraph VIII of the bill (Record, p. 10) five grounds are indicated on which the liability of West Virginia rests. The first of these grounds is that the mere partition of the territory created the liability. Writers on international law agree that—

"In the event of a State being divided into two or more independent sovereignties, the obligations which had accrued to the whole before the division are ratably binding on the different parts; for, as Story says, 'the division of the empire creates no forfeiture of previously vested rights of property.' And so *ex contracio,* where several separate States are incorporated into one sovereignty, the rights and obligations that belonged to each before the union are binding upon the new State; but, as General Halleck points out, of course the rule must be modified to suit the nature of the union framed and the characters of the act of incorporation in each particular case."

1 Wharton, International Law Digest, sec. 5, p. 19, citing authorities.

1 Oppenheim on International Law, p. 122.

Wheaton, International Law, 4th English ed., p. 46.

Hartman v. Greenhow, 102 U. S., 672.

In 5 Moore on International Arbitrations, pages 4618-19, the case of the "Tarquin" is reported. On page 4619 it is said:

"This claim was in the nature of a public debt, founded upon the King's decree, and by the rule of international law public debts are not extinguished upon the division of a State into distinct States, whether that division be by war or by mutual consent; but they must be discharged either jointly or severally, according to the principles of justice and equity," &c.

The partition of territory alone, without agreement and without consent, imports an equalization of the burdens which were incident to the territory between the partitioners. The only question is, by what rule shall such equalization be made?

It is charged in the bill, and indeed is matter of public history in Virginia, that the sole purpose had in view in the construction of the works of internal improvement for which

this debt was created was the development of the natural resources of the region to the west of the Alleghany mountains. The action of the delegates from that region in the General Assembly of Virginia confirms this.

The answer of the defendant denies this, and affirms that they were constructed for the development of the eastern part of the State. There were no natural resources in the eastern part that could be developed. The seacoast was there, and it was to bring to the coast the timber, coal, and other minerals of the west that the turnpikes, railroads, canals, and bridges were constructed. The reports of the Commissioners of Public Works through many years will attest this.

The enlightened sense of equity and justice throughout the civilized world has now become crystallized in the rule of international law which is stated above. That is the rule which Virginia asks may be applied here, and not the rule of the Wheeling ordinance, framed by the very people who then and now were guided and controlled by the single purpose of protecting West Virginia from this very liability.

It was not necessary that Virginia should have paid off the entire public debt before it could call on West Virginia for contribution. It was as much the debt of West Virginia as it was of Virginia. Virginia comes into court and invokes the application of those well-settled doctrines of equity of exoneration and of *quia timet*, and prays that the burden may be adjusted by the court in accordance with those doctrines and methods of procedure.

1 Spence, Equity Juris. (marginal), page 662.
3 Pomeroy, Equity Juris., section 117 and notes.

The act "to provide for the funding and payment of the public debt," approved March 30, 1871 (Record, p. 13), recites that—

> "Whereas in the formation of the State of West Virginia, there were included within its boundaries about one-third of the territory and population of the State of Virginia; and whereas in the ordinance au-

thorizing the organization of said State, it was provided that the said State should take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, which provision has not yet been fulfilled, although repeated and earnest efforts in that behalf have been made by this State, and will continue to be made as long as may be necessary; and whereas the people of this Commonwealth are anxious for the prompt liquidation of her proportion of said debt, *which is estimated to be two-thirds of the same.*"

The estimate here referred to, of the proportions in which the "public debt of the Commonwealth of Virginia" should be borne by the two States into which the territory of that ancient Commonwealth was now divided, was not recklessly or arbitrarily assumed, but was the result of a careful and intelligent reckoning. The territory and population of each State was considered, and the value of such territory taken into account, embracing therein all those constituent elements, natural and artificial, which enter into and make up the wealth of a State. The seacoast, the navigable rivers, the agricultural lands, with the works of internal improvements, in varying stages of completion, which formed the value of Virginia, and the vast mineral wealth of coal, gas, oil, and the forests of hardwoods of inestimable value that formed the wealth of West Virginia. These elements of wealth duly considered, it was thought that West Virginia should bear, at the very least, one-third of the common public debt. It is charged in the bill that "West Virginia had vast potentialities of wealth and revenue in the undeveloped stores of mineral and timber which had been known for many years prior to the first of January, 1861, and their prospective values, if made accessible to the markets of the country were understood to be well nigh beyond computation." The answer of West Virginia admits the charge, but avers "that the same was inaccessible, and of very little value on the first of January, 1861." And yet on July 1, 1862,

when the restored State of Virginia, through her Senators and Representatives in Congress, was endeavoring to have the new State erected within the territory of Virginia, one of those Senators, Willey, employed as an argument in support of the creation of a new State, the existence of the vast resources of mineral wealth in that territory. He said:

> "Here is an opportunity presented to the Senate to erect northwestern Virginia into a free State, a condition for which she was designed by the God of nature—the richest portion of this broad land in mineral resources—with inexhaustible marble quarries equal to those of Egypt and very similar; rich in inexhaustible fountains of salt and oil, and forests exceeding any of those that ever waived upon Mount Lebanon itself, that have remained from the foundation of the government of the State of Virginia, undeveloped, useless, valueless, simply because we have not been able to organize improvements within and under the control of the western section."
>
> Congressional Globe, second session of Thirty-seventh Congress, 1861-'2, p. 3037.

And on the 14th day of the same month, in the same debate, he said:

> "This new proposed State contains within its towering hills and mountains treasures richer perhaps than can be found within the limits of any other State within this Confederacy, and there they have lain ever since the establishment of this Government, undeveloped, unworked, valueless, and they must continue to remain so unless a different policy is pursued."
>
> *Ibid.*, p. 3317.

It was this potentiality of wealth that those railroads, turnpikes, canals, and bridges were being constructed by Virginia to develop and realize for which this public debt of the Commonwealth was created. It was this vast wealth which was in the view of Senator Willey, in 1862, when in the Senate of the United States he urged it as a strong ground

why the new State should be laid off in the limits and from the territory of Virginia; that such new State would be a free State, and all this wealth of which Virginia would be thus despoiled would become the exclusive property of the new State, and that the provision made by the Wheeling ordinance for ascertaining the just proportion of the public debt of Virginia to be borne by the new State would not embrace or take into account any portion of this public wealth. It was this vast wealth which, in the estimation of Virginia in 1871, imparted so great value to the hilly and mountainous territory of West Virginia that, in computing the just proportion of the public debt which West Virginia in equity and good conscience should bear, she reckoned with extreme moderation that the territory of West Virginia was equal at least to one-third of that of Virginia, and so did she apportion their respective contributive shares of this common liability.

But it is suggested that an account is necessary to ascertain the amount which West Virginia should contribute, and, further, that such account should be taken on the principles of a partnership account.

We cannot perceive in the relations existing between Virginia and West Virginia any of the features which distinguish a partnership. A partnership has been defined by this court to be—

> "a voluntary contract between two or more competent persons to place their money, effects, labor and skill, or some one or all of them, in lawful commerce or business, with the understanding that there shall be a communion of profits thereof between them."

What was the contract and who were the parties and what were the terms of any partnership when the common debt, here sought to be apportioned, was created? The Commonwealth of Virginia was a political body, a sovereign corporation, a member of the Federal Union when she created this debt, and issued her bonds therefor. The counties of Vir-

ginia, which now form the State of West Virginia, were in no sense partners with the other counties of Virginia. They were all members of one body. The welfare of one member was the welfare of the entire body. These counties, by their own voluntary act, seeking their own exclusive selfish interests, procured their separation from the body corporate and politic of Virginia, and, after they had done so, they sought and obtained the political recognition and support of the National Government to gain for themselves separate political existence and autonomy. On the principles of international law, they remained liable for a just proportion of the public debt of Virginia. What doctrine or maxim of equity can be invoked to entitle these counties to demand a marshaling of the assets of Virginia? What indeed would be counted as constituting those assets? If a partnership existed, then all the partnership fund constituted the assets and not any particular part of such fund. The debt which is here sought to be apportioned was not created on the security of any particular asset of Virginia. It was created on the faith and credit which the lenders of money extended to the Commonwealth of Virginia. The bonds which the Commonwealth issued were the obligations of the whole State and for which the entire State was liable. They were not the bonds of the counties of Virginia *jointly*. They were the several obligations of one body politic. The debt evidenced by them was the debt of the State, sanctioned and imposed by the people of Virginia, through their General Assembly, acting within constitutional limits. *How* the money derived from these bonds was expended by legislative appropriations, or *where* it was expended, are considerations which should not even be inquired into in this proceeding, for it matters not in the present inquiry whether the entire debt of $33,000,000 was expended within the limits of Virginia or of West Virginia, so that it was expended by a legislature in which all parts of the State were fully represented. The expenditure must be conclusively presumed to have been made in good faith and for the welfare of the whole body

politic. Two thousand five hundred years ago Æsop illustrated this in the fable of the "Belly and the Members." The liability, or the measure of the liability, of the two States into which the territory has since been divided can in nowise depend upon the amount of the proceeds of the loan which may have been expended in each. If any valid, actual, legal agreement was entered into between the two States, by which the proportion in which they should contribute to the common burden was fixed, or if any means were agreed on by which such proportion should be ascertained, then such agreement must control. But if no such agreement can be shown, then on principles of international law each State remains liable for the whole debt, and the apportionment of the burden between them is a juridical matter to be settled by the courts.

How shall the proportions of this debt to be borne by the two States, respectively, be ascertained? Virginia, in 1871, estimated that it should be borne in the proportion of two-thirds by Virginia and one-third by West Virginia. She formed this estimate by computing the vast undeveloped mineral wealth of West Virginia—her "unsunned gold"—as making her equal to one-third of the entire value of old Virginia, including therein all the works of internal improvement, completed and uncompleted, that remained within the limits of the present Virginia. But suppose this estimate of Virginia should not be adopted, how should the court ascertain the just proportion? It is suggested that West Virginia should be charged with only so much of the public debt as was actually expended within her borders, and Virginia should be charged with so much of said debt as was actually expended within her borders. But we have shown that wherever or however the amount of money represented by the debt was expended within the limits of old Virginia, it was all expended for the benefit of the whole body of the State. That the counties constituting West Virginia seceded from the old State before the improvements were completed, and thus prevented their completion, and

that she sought by such secession and has now succeeded in monopolizing for her own exclusive use all those stores of natural wealth which would have afforded to the old State the basis of taxation by which the public debt could be easily and speedily discharged, surely affords her no equitable ground for an apportionment of liability on such a basis. If an accounting is to be had on the basis of the wealth of the respective States, then in estimating such wealth it will be impossible to ignore or disregard the mineral wealth of West Virginia. Her coal and oil and gas and marble and timber must be taken into the account, not according to their taxable values in 1861, but according to the values which would have been given to them by such an appraisement as would have been made of them in a suit for partition. The present material condition of West Virginia is but the fulfillment of the expectations that were entertained by the people of Virginia a hundred years ago. It was foreseen when the scheme of internal improvements was entered upon in 1820. It was foreseen and appreciated by Senator Willey in 1862. It was distinctly appreciated and estimated by the legislature of Virginia in 1871, when it reckoned the just proportion of the public debt of Virginia as of 1861 which should be borne by West Virginia at one-third of the aggregate amount of that public debt.

The "Special Agreement" Theory.

It is claimed on the part of West Virginia (Brief for Defendant, p. 11) that a "special agreement" was entered into between the States of Virginia and West Virginia, by which the method prescribed by the Wheeling ordinance was adopted as the exclusive method of ascertaining the amount of that "just proportion" which it was declared West Virginia should bear.

The "special agreement" relied on by defendant appears to be that feature of the Wheeling ordinance which prescribes the method for ascertaining what is the "just propor-

tion" of the public debt to be borne by West Virginia. Section 9 of the Wheeling ordinance presents two distinct features, which must not be confounded with each other, viz: (1) A recognition of the liability of West Virginia for a just proportion of the public debt, expressed in these words:

> "The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861."

It was this feature that is referred to in paragraph XVIII of the bill, and which defendant, on page 7 of his brief, insists is a recognition by plaintiff of the terms of the ordinance. (2) The method by which such "just proportion" shall be ascertained, expressed in these words—

> "to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government, since any part of said debt was contracted; and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during the same period."

In pointing to the Wheeling ordinance as a recognition of West Virginia's liability for a just proportion of the common debt, section XVIII of the bill cannot be construed as an admission of the validity of the method of ascertainment proposed in the second feature. That section refers only to the "liability" recognized, and it indicates the ordinance as the one "in which the method of ascertaining her liability on account of said debt is prescribed," without in any way assenting to or conceding the validity of such method.

Suppose the second feature of the ordinance had prescribed as the method of ascertaining the just proportion that West Virginia should pay one mill on every thousand dollars of the public debt, or that it should pay one mill on every thousand tons of coal shipped from the State, could it be truly contended that the Commonwealth of Virginia had

deliberately consented thereto? Yet, as I have endeavored to show, these supposed methods are not one whit more whimsical and fantastic than the method actually proposed, because the difference between the amount that a county has paid into the State treasury, in a given period, in taxes, and the amount that has been expended within that county by legislative appropriations during that period has no more connection with the public debt of the State than the number of tons of coal shipped from such county during such period can have.

There can be no question as to the power of two States, or of two sections of the same State, to enter into compacts within the conditions existing in the cases of Green *v.* Biddle, 8 Wheat., 1, and Wharton *v.* Wise, 153 U. S., 155, or as to the soundness of the rule stated in Wharton *v.* Wise, p. 173:

> "The consent of Congress to any agreement or compact between two or more States is sufficiently indicated—when not necessary to be made in advance—by the adoption or approval of proceedings taken under it."

But can it be said that Congress ever saw or considered the Wheeling ordinance or ever knowingly adopted any proceedings taken under it? Congress had before it the constitution which had been framed for the proposed new State, and the act of May 13, 1862, purporting to give the assent of Virginia to the erection of this new State. Nothing appears in the constitution as to this method of ascertaining West Virginia's share of the debt. The provision of the constitution appears in article 8, section 8, and is as follows:

> "An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, shall be assumed by this State; and the legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest, and redeem the principal within thirty-four years."

There it appeared to Congress that adequate provision had been made for the payment of West Virginia's "equitable proportion" by requiring the legislature to ascertain the same, and then provide a sinking fund for its payment.

Can it be supposed, in view of the debates that occurred in Congress on the bill for the admission of West Virginia into the Union, that such bill would have become a law if it had appeared in the constitution under which it sought admission that it proposed to ascertain its equitable proportion of the debt by deducting from the amount of taxes it had paid since the first debt was incurred the amount it had received in the way of legislative appropriations? It gained admission into the Union by the method indicated in its constitution. It now proposes to fall back on a method which would have defeated its effort to be admitted into the Union.

Sections 5 and 7 of Article 8 of the Constitution.

On pages 18 and 19 of their brief counsel for defendant insist that the words "previous liability" in the 5th section and the words "public debt" in the 7th section do not refer to West Virginia's liability to her equitable proportion of the public debt of the Commonwealth of Virginia.

What other *previous liability* of the new-born State existed besides the public debt of the old State? Many of the States of the Union now provide in their constitutions that no public debt of the State shall be created. But counsel for defendant insist that while the State may be thus prohibited from creating *a public debt*, it is not prohibited from creating *a public liability*, and that when a public liability is created then the legislatures may create a public debt to extinguish the previous liability. It is not to be supposed that the court can be favorably impressed by such linguistic juggery. The liability of West Virginia for a just or equitable proportion of the public debt of Virginia existing previously to the formation of this constitution was recognized by the

constitution, and provision was made to meet it. This provision contemplated the issuance of bonds of the new State, but it was intended to leave no room for the creation of any other public debt, and hence it was that in this section 5 of article 8 it was provided that "no debt shall be created by this State except to meet * * * a previous liability of the State," &c. So in section 7 of article 8 it was provided that the legislature may sell all the stocks owned by the State in banks and other corporations, "but the proceeds of such sale shall be applied to the liquidation of *the public debt*," &c. What was *the* public debt?

Note, it is not *a*, or *any* public debt, but *the* public debt. There was and could be but one public debt, and that was the public debt which West Virginia had in common with Virginia, and as part of Virginia previously created.

Counsel argue on page 20 of their brief that because this same provision appears in the later constitution of West Virginia, adopted in 1872, that for that reason it could not have been intended to apply to the public debt of Virginia prior to 1861. It is true that this provision was repeated in several constitutions adopted by West Virginia, as was also section 8 of article 8; but it may be also true that when control of the State passed from the hands of the native-born citizens and into the hands of citizens from other States who had drifted into West Virginia and had filled all the high offices of the State, then these provisions disappeared from the later-formed constitutions. The reason for such disappearance is not far to seek. Doubtless the hope was indulged that a repudiation by omission of this declaration of liability might soon warrant a repudiation by express disavowal of liability, a stage which, it appears, has now been reached.

Both Virginia and West Virginia in their respective constitutions prohibit the creation of any more public debts. Virginia has learned from experience. West Virginia has taken warning from the example before her. But both States have recognized that it might become needful to issue new bonds in order to extinguish the existing debt which

rested upon both of them, and hence it was that each State provided that the prohibition should not extend to "previous liability," referring in each case to their respective liabilities for the existing public debt of the old State.

It is evident that West Virginia now rests her entire defense to the case stated in the bill on the recognition by this court of the Wheeling ordinance as a contract between the States of Virginia and West Virginia and now binding on the Commonwealth of Virginia. On the part of Virginia it is submitted that she had no part or lot in that matter. It surely lacked one essential element of a *contract;* the people who proposed the ordinance, and the people who accepted it were the same people. They did not coexist at the same time as parties to the contract. They contracted with themselves at successive stages of their continuing existence. When West Virginia was created Virginia ceased to be in that territory. True, the governor, who was a citizen of one of the counties of the new State, did not relinquish his titular office of governor of Virginia, but moved his seat of government to Alexandria and remained there within the Federal military lines. He assembled a handful of men, who masqueraded as the General Assembly of Virginia, and then on the 11th of April, 1864, organized a Constitutional Convention of Virginia, and adopted a new constitution for Virginia, the 27th section of which is quoted on page 22 of defendant's brief, by which the Wheeling ordinance was held to have no binding force upon Virginia. It was all a grim farce. But it cannot be denied that they had as much legal right to repudiate its binding force on Virginia as they had in August, 1861, to impart such binding force to it. The existing public debt of Virginia in January, 1861, was $33,000,000, as admitted in the answer to the bill. This was the debt of West Virginia, or of the counties constituting it, as much as it was of the other counties of Virginia. If the wealth of West Virginia was equal to one-third of the wealth of the whole Commonwealth of Virginia, then the

equitable proportion of that debt to be borne by West Virginia should be $11,000,000 as of January, 1861, and that amount should now be adjudged to be due by her.

Sections 3, 4, 5, and 6 of the Decree Proposed by Defendant.

These sections of the decree are also objected on behalf of the complainant on the ground that they seek inquiries into matters that have no apparent connection with the ascertainment of West Virginia's "just proportion" of the public debt of the Commonwealth of Virginia prior to January 1, 1861. The amount of that public debt as of the date named is admitted to be about $33,000,000. The exact amount is susceptible of ascertainment. The only other question is as to the just proportion to be borne by West Virginia. If the proportion heretofore fixed by Virginia, of one-third, is objected to, then it remains for the court to determine, through its master, or in such other way as it may adopt, what the just proportion is. It has been assumed on the part of Virginia that the evidence relevant to such inquiry, which is altogether documentary, consisting of the public records and files of the Commonwealth of Virginia, could not appropriately be laid before the court at this stage of the cause, but would be produced before the master at such times and in such manner as he might require.

Should it be found that one-third of the public debt is the just proportion to be borne by West Virginia, then any inquiry into the manner in which Virginia has settled with her creditors for the two-thirds of said public debt, assumed by her as her just proportion, can have no relevancy to the inquiry here.

The certificates issued by Virginia represent only the bonds which were surrendered by the creditors and are now held by Virginia in trust for the owners of them; as to the one-third set apart as West Virginia's just proportion of the

debt evidenced by such bonds, the bill sets forth with minuteness of detail the amount of such certificates, which has been assembled by the committee representing such bondholders, under the plan adopted for the settlement between Virginia and her creditors and under the acts of the General Assembly of Virginia, all of which appear in pages 39-66 of the bill and exhibits, no part of which appears to be denied by the answer of the defendant.

HOLMES CONRAD,
Of Counsel.